United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7099

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT.

B P/S

Docket Nos. 76-7099, 76-7100.

REA EXPRESS, INC.,
Plaintiff-Appellant,
Cross-Appellee,

v.

INTERWAY CORPORATION and
INTEGRATED CONTAINER SERVICE, INC.,
Defendants-Appellees,

INTERWAY CORPORATION,
Defendant-Cross-Appellant.

On Appeal From Judgment of the United States District Court for the Southern District of New York Civil Action No. 73 Civ. 560 (CLB).

BRIEF FOR APPELLANT.

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PRELIMINARY STATEMENT.

This is an appeal from the judgment entered by the Honorable Charles L. Brieant of the United States District Court for the Southern District of New York on January 30, 1976 dismissing, *inter alia*, appellant's claim that appellee breached its contract to use its best efforts to register certain securities with the Securities and Exchange Commission. The findings and conclusions of Judge Brieant are not yet officially reported. They appear at page 77a of the appendix.

STATEMENT OF ISSUES PRESENTED.

1. Did the contract between the parties justify appellee's refusal to start performing its obligation to use best efforts to register certain common shares on the ground that it had not yet received a pledgee's consent to the conversion of appellant's preferred shares into common shares?

2. Did the contract between the parties justify appellee's refusal to start such performance prior to the actual conversion of the preferred shares to common shares?

3. Did appellee's demand for conversion in advance of any efforts toward registration, which demand interfered with appellant's effort to secure the consent of the pledgee, exonerate appellant from any duty it might have had to tender such consent?

STATEMENT OF THE CASE.

On November 1, 1968 closing took place on a transaction whereby appellant, REA Express, Inc. ("REA"), sold 51% of the shares of REA's subsidiary, Realco, to Integrated Container Service Industries ("ICSI"), predecessor of appellant Interway.[1] Part of the consideration was an option to REA to exchange any part of the remaining 49% of the Realco shares for preference shares of Interway (46a). The preference shares (sometimes referred to as preferred shares) were a new class of shares intended to be issued only to REA, unregistered with the Securities and Exchange Commission, and consequently not salable to the public. REA, however, was to have the right to convert the preference shares into common shares, and Interway had the obligation to use its best efforts to register the common shares into which the preference shares were convertible.

Shortly thereafter, Interway made a public offering of common shares pursuant to a registration statement effective March 6, 1969. In connection therewith REA exchanged 13% of the Realco shares it still held for preference shares of Interway, indicating its intent to convert these shares to common shares and to sell the common. Consequently, the registration statement included the common shares into which REA's preference shares

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1. The October 11, 1968 purchase agreement for the sale of Realco was made between REA and Integrated Container Service Inc., a Pennsylvania corporation (ICS). Prior to the closing of the transaction on November 1, 1968, ICS transferred its assets and business (subject to liabilities) to a new Delaware corporation also called Integrated Container Service Inc. (ICS-Del.) in return for all of the capital stock of ICS-Del. At the same time, a holding company ICSI was formed to hold all of the stock of ICS-Del. and Realco and certain other subsidiaries. In May 1971 the name of ICSI was changed to Interway Corporation. In this brief we will refer to all of these entities as Interway (41a-42a, 47a).

would be convertible. The conversion itself did not take place until March 12, 1969 (48a, 272a).

A few months later REA sought to tender the balance of its Realco shares, again contemplating the conversion of the preference shares to common and the public sale of the latter. Interway expressed some reluctance, and consequently the parties entered into a new agreement whereby REA sold the balance of its shares to Interway on June 23, 1969 for $4,714,290 and 143,673 preference shares [2] (50a). REA's conversion-registration privilege with respect to the preference shares was governed by the original agreement except that REA agreed not to seek registration of the common stock into which the preference shares were convertible before December 1, 1969 (unless the market price went up to $30) (279a).

In June 1971 REA started to seek registration of the common stock it could receive so that it could convert the preference shares and market its holdings in Interway. (Details of the demand and Interway's response are set forth, *infra*, at 5.) The common shares were never registered and REA was still holding the preference shares when this litigation commenced on May 30, 1972. While the lawsuit was pending Interway purchased the preference shares from REA (55a).

At trial REA pressed two causes of action: a claim under the Securities Laws for misrepresentation of Interway's future prospects during the negotiation of the original 1968 transaction (Count I of the Amended Complaint); and a pendent claim for Interway's refusal to register the common shares into which REA sought to convert its preference shares (Counts II and III of the Amended Complaint, reflecting alternate approaches to damages).

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2. Subsequent stock dividends increased REA's holding of preference shares to 165,225 (51a, 54a).

The District Court found that an actionable misrepresentation had taken place, but dismissed the first claim on the ground that REA had not relied on the misrepresentation. The second claim was dismissed on the ground that REA, in seeking registration and conversion, had failed to tender the written consent of the pledgee of the preference shares.

The appeal relates only to the dismissal of the second claim for refusal to register, and the following more detailed statement of fact will relate only to matters relevant to the legal issues presented by that controversy.

The agreement of the parties is set forth in a contract dated October 11, 1968 (249a) which, in turn, makes reference to the terms of an offer of September 23, 1968 (135a). These documents refer to REA's option in terms of a right to accept the continuing offer of ICS. With respect to REA's rights of conversion and registration, the agreement of October 11, 1968 provides in relevant part as follows (251a-252a):

> "ICS agrees that, at any time and from time to time following an acceptance by REA of all or any part of your additional offer or following the written notice of REA of intent to accept all or any part of such offer on or after the time the registration statement hereinafter referred to becomes effective, upon the written request of REA, ICS will, at its expense (including, without limitation, legal, accounting and printing costs, but excluding the cost of printing such number of copies of the preliminary and final prospectus as may be requested by REA for distribution by the underwriters), use its best efforts to register not less than the number of shares of ICS Common Stock (to be received by REA on conversion of the Preferred Stock) so requested to be registered under the Se-

curities Act of 1933 (hereinafter called the "Act"), and to keep such registration effective for a period of at least nine months; provided that in no event shall ICS be required to effect more than two registrations under this paragraph."

On January 15, 1969 REA simultaneously tendered additional shares of Realco and demanded registration of the common shares "to be received by REA on conversion of the ICSI preference stock." (269a). The actual conversion of preference shares to common shares took place on March 13, 1969 (271a, 272a), six days after the finally approved prospectus which made the common shares salable to the public—and months after the commencement of the registration procedure (48a).

The next effort by REA to make use of its right under the agreement of October 11, 1968 took place on June 10, 1969 (50a, 275a). Again there was a single notice tendering further Realco shares and demanding both conversion and registration. It was spelled out that REA's exercise of its option would be effective only at the time of distribution (i.e. after effective registration) and that the required opinion of counsel as to clear title, and tender of certificates, would be supplied when the distribution commenced.[3] Interway raised no objection to this pro-

3. The letter (275a) refers to "the opinion of counsel and the tender of the certificates referred to in the letter agreement," an obvious reference to page 2 of the agreement of October 11, 1968 (249a) calling for:

> "(2) delivery by REA to ICS of an opinion of counsel for REA to the effect that REA has good and marketable title to the Realco shares to be delivered to ICS, free and clear of all liens, pledges and other encumbrances, and (3) tender of the certificates for such shares by REA to ICS, with stock powers in blank". (250a)

This is clearly limited to the Realco shares to be exchanged for preference shares. The agreement contains no comparable provision as to preference shares to be converted to common shares.

cedure but on the contrary advised that it would "proceed, using its best efforts, to register under the Securities Act of 1933, the 202,041 shares of Common Stock to be received by REA EXPRESS on conversion of the 134,694 shares of ICSI Convertible Preference Stock." (278a).

This registration never took place because the parties subsequently worked out an agreement whereby REA turned over all its remaining Realco shares, partly for cash and partly pursuant to the letter agreement of October 11, 1968 (279a). With respect to the preference shares, REA's rights were modified as follows:

> ". . . and REA further agrees that it will not request a registration statement pursuant to the Securities Act of 1933 in respect of the underlying shares of Common Stock into which the shares of your Preference Stock (receivable upon acceptance of such offer) are convertible prior to the earlier of December 1, 1969, and the date on which the bid price of your Common Stock shall be reported by the National Quotation Bureau, Inc. to have been $30 or more for ten consecutive trading days." (279a-280a).

On June 14, 1971, after a prior discussion, REA requested Interway to register 158,041 shares of common stock "as converted on a one to 1.5 ratio of preferred stock" (283a). A meeting was then held to discuss the letter. Interway requested "thirty days within which to come up with a definite alternative proposal to present to you" and requested that the extension be formalized and approved by REA's Board of Directors (284a). REA, on June 24, 1971, responded that it was continuing to press the request for the registration or for "a solution to the problem that could be considered by the Board [of REA]" (285a).

On July 1, Interway's representative Goldman responded as follows (286a):

> "Interway's Counsel tells me that your letter of June 14, 1971, is not sufficient for two reasons:
>
> (1) Interway's stock records indicate that its outstanding convertible preferred issued to REA for the acquisition of a portion of REALCO is currently held in the names of Carr & Co. (79,020½ shares) and Kugler & Co. (79,020½ shares). The written consent of these holders to your request for registration of the common shares into which the preferred is convertible is necessary.
>
> (2) The convertible preferred must be converted into common shares before further efforts can proceed to register the common stock. If you will tender the preferred certificates to this office, Interway will issue you certificates for the common shares.
>
> I would also like to mention in connection with the alternative courses of action set forth in your letter of June 24, 1971, that in lieu of a registration, we will continue to work with you on a proposed solution to the problem for consideration by your Board at its July 20th meeting." (286a).

Subsequent negotiations between the parties resulted in an agreement that REA would attempt to obtain a no action letter from the Securities and Exchange Commission in order to enable REA to liquidate its Interway holding without the filing of a registration statement. On July 28, 1971, Mr. Herner, of Anderson & Allegaert, who had been involved in these negotiations and who was to pursue the no action letter, wrote to Interway (288a). He confirmed that REA would seek the no action letter but warned that

REA was still insisting on a registration statement if it was impossible to avoid it by means of a no action letter. Mr. Herner dealt specifically with the letter of July 1, 1971 previously quoted. With respect to the consent of the pledgee, he stated "while we do not feel it is necessary, we are in the course of obtaining the consent of the person for whom Kugler is a nominee . . ." (288a-289a).[4] With respect to the demand that the preference shares be converted into common shares "before further efforts can proceed to register the common stock," Mr. Herner attempted to demonstrate that this condition was inconsistent with the contractual language, with common practice, and with the logic of the situation.

In response on July 29, Interway's representative Goldman purported to doubt whether Mr. Herner had authority to present this position on behalf of REA although he admits that Herner had been negotiating with Dennis Kenney (general counsel of Interway) concerning the no action letter, and although Mr. Herner's letter showed that copies were being sent both to Mr. Kenney and to Mr. Wisehart (general counsel for REA) (292a). On this basis Mr. Goldman told REA's representative Jenkins, "If you establish that he is in fact authorized to speak on REA's behalf in this matter, and that his letter correctly reflects REA's position, then we should be happy to respond in detail." (292a).

On the very same day that Mr. Goldman was raising the question of Mr. Herner's authority to write on behalf of REA (and sending best regards from Bob, Dennis [Kenney], and me), Mr. Kenney himself submitted a ten page letter of his own asserting for the first time breaches of warranty dating back to the 1969 sale of Realco and

4. Mr. Herner also pointed out that REA had redeemed the shares previously held in the name of Carr & Co. (289a). Thus, the issue of consent involved only one pledgee.

claiming damages in alternate amounts of $16 million and $10 million (293a).

After Interway confirmed the authority of Anderson & Allegaert on August 4, 1971 (303a), Mr. Kenney on August 12 replied to Mr. Herner's letter of July 28 (304a). He reiterated not only the demand for the consent of the pledgee, but "our requirement that REA first convert before requesting registration." (305a). The only explanation for this rigid position was a purported concern that REA might decide not to convert "after Interway had made substantial expenditures preparing the registration material." (306a).

REA proceeded with a request for a no action letter (312a), and by letter of October 12, 1971 (enclosing a copy of the request) reiterated its position that Interway was nevertheless bound to proceed with a registration (265a). On October 19, Interway again asserted its position, by reference to the prior letter of July 1, 1971, that "REA has not fulfilled the conditions precedent for a proper request to register." (266a).

REA's request for a no action letter was rejected by the Securities and Exchange Commission (368a). Interway never withdrew from its position with respect to the two "conditions precedent", and REA remained the holder of unsalable preference shares until these were purchased by Interway during the pendency of the lawsuit.

There is no evidence that Interway was, or had any reason to be, concerned about whether REA would in fact make use of the registration it was requesting.

Mr. Pedersen, a shareholder, officer and director as well as the draftsman of the original agreement between the parties, had no recollection of the imposition of the condition at the time of his deposition (128a), and his testimony at trial was confined to other subjects (Tran-

script 120-182). Mr. Kenney, who had written the letters expounding Interway's position was present at the trial but did not testify at all.

The uncontradicted evidence was that the pledgee of the preference shares was perfectly willing to have them converted into registered common shares. What the pledgee objected to was the same thing that REA itself objected to: converting the preference shares to common *in advance* of a registration that would make the common shares salable (307a, 126a-127a).

ARGUMENT.

The District Court did not deal explicitly with the propriety of Interway's demand that the preference shares be converted to common before Interway would take any steps toward registration.[5] The focus of the opinion is entirely on REA's failure to supply the consent of the pledgee to the conversion of the preference shares to common, and the decision is based on the conclusion that the pledgee was the "holder" within the meaning of the certificate of incorporation. It is our position that:

(1) REA had a direct contractual right to demand registration without the joinder of the pledgee.[6]

(2) Interway's insistence on conversion prior to the commencement of registration efforts was a fundamental breach of contract which excuses REA's failure to supply the written consent of the pledgee—even if the requirement of such consent could otherwise be treated as an appropriate condition.

(3) Interway cannot rely on the failure of REA to supply the written consent of the pledgee because Interway's unlawful insistence on conversion in advance of registration is what prevented the submission of the consent.

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5. The Court seems to support Interway's position by the statement: "Interway thus had a legitimate interest in obtaining the consent of the holders of record before proceeding with the conversion of the preferred *and subsequent registration* of the common." (102a). (Emphasis supplied.) Footnote 9, however, can be interpreted in support of the opposite assumption (118a).

6. The District Court refers to two pledgees (99a-100a). It is true that there had been two pledgees in whose name the stock was still registered, but one of the pledges had already been redeemed (289a), and Interway had indeed acknowledged that all that would be required with respect to this part of the stock was the exhibition of the share certificates reflecting the removal of the encumbrance (305a).

I. REA Had a Direct Contractual Right to Demand Registration Without the Joinder of the Pledgee.

The governing agreement of October 11, 1968 (quoted in extenso, *supra,* at 5-6) gave to *REA* the right to have Interway "use its best efforts to register not less than the number of shares of ICS common stock (to be received by REA on conversion of the preferred stock)." There is no reference to a "holder" or to a transferee or to a pledgee—and there is absolutely nothing in the agreement which could be interpreted as requiring REA to prove the unencumbered status of the stock as of the time of the request for registration or the commencement of Interway's efforts with respect thereto.[7]

Obviously REA could get no practical benefit from a registration of common shares unless it was in a position ultimately to acquire those shares by tendering preferred shares for conversion into common, and such a tender could take place only if REA held unencumbered title to the preferred shares or was in a position to secure the consent of the pledgee. Consequently, it would be foolish for REA to exercise its limited right to demand registration at a time when the preferred shares were pledged unless it could count on either obtaining the consent of the pledgee or raising the money to pay off the pledgee. But the contract gave Interway no license to intrude into REA's decisional process in this respect.

The clear language of the contract is reinforced by the parties' virtually contemporaneous interpretation of it.

When REA first exercised an option to submit additional Realco shares to Interway it simultaneously arranged

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7. The amended Certificate of Incorporation authorizing the issuance of the preferred shares, quoted by the District Court at page 24 of the Opinion (101a), provides for the holder's conversion of preferred shares into common, but the right to insist on a registration at the expense of Interway is dealt with only in the body of the agreement of October 11 and is limited to REA (251a-252a).

for the conversion of the preferred shares of Interway (which it was to receive for the Realco shares) into Interway common shares and the registration and marketing of those common shares. The actual conversion did not take place until after the registration statement had become effective (page 6, *supra*).

Again, on June 10, 1969 REA called for a further exchange of Realco shares for Interway preferred shares and the registration and conversion process which would permit the public marketing of the consideration to be received from Interway. The exercise of the option was expressly ". . . contingent on, and to become effective at the time of, the commencement of the distribution of such stock (or ICSI common stock into which such stock is convertible)." (275a).[8] Moreover, it was explicitly stated that "the opinion of counsel [as to the unencumbered status of the Realco shares—see 250a] and the tender of the certificates referred to in the letter agreement shall be made at the time at which such distribution shall be commenced." (275a). In short, REA was quite plainly planning to get the Realco shares released from an existing pledge when and if the registration actually became effective. On June 13, 1969 Interway agreed to register the common shares on this basis (278a). This exchange between the parties varied from the transaction in controversy here in that the tender of Realco shares was involved *in addition* to the registration of common shares and the conversion of preference shares, and the registration agreed to was supplanted by a new agreement between the parties. The dealings nevertheless clearly re-

8. REA asked for a registration of the preference stock itself as well as the common into which it would be convertible. But the agreement of October 11, 1968 did not require Interway to register preference stock, and Interway's reply related only to the registration of the common stock.

flect the understanding of the parties that REA was entitled to demand registration and then make whatever arrangements would be necessary to take advantage of the registration by submitting unencumbered preferred shares in exchange for the common shares that had thus become salable.

II. The Interway Demand for Written Consent of the Pledgee Was Rendered Irrelevant by Interway's Insistence on Conversion Prior to Commencement of Registration Efforts.

Interway's demand that REA surrender the advantages of being a preferred shareholder before Interway even started the "best efforts" to register common stock was perfectly arbitrary. The agreement plainly contemplated conversion only in connection with a public sale (251a-252a) [9] and referred expressly to registration of the "common stock to be received by REA"—not to the common stock which REA had already received by a conversion prior to the commencement of registration efforts. REA was indeed entitled to give notice of intent to sell further Realco shares "on or after the registration statement hereinafter referred to becomes effective." (251a-252a). The conversion of preferred to common would, of course, have to take place *after* the preferred had been received for the Realco shares, and therefore, *after* the effective registration.

The clear contractual provisions were consistent with the logic of the situation. No one can—and Interway did not—guarantee that "best efforts" to register will be suc-

9. Moreover, the amendment of the Certificate of Incorporation which authorized the preferred stock permitted conversion (with limited exceptions) only in connection with a registration or substitute method of rendering the common stock salable to the public (262a-263a).

cessful. If the registration effort failed (or if Interway found a new excuse for not registering), why should REA have been saddled with unsaleable common stock as a substitute for more valuable preferred stock? Conversely, Interway itself had no desire at the time of the agreement to see the preferred stock converted into unsalable common stock, a fact attested by the *limitation* on conversion rights to situations in which the resultant common *would* be salable (Footnote 9, *supra*). And, the prior practice of the parties, described, *supra*, at 13-14 reflected their understanding that REA was entitled to await the registration before proceeding with the conversion.

We may here concede for the sake of argument that the Interway request for consent of the pledgee—"holder"—was in itself a reasonable condition which REA was bound to comply with. The fact would remain apparent that REA had no reason to believe this consent alone would cause a registration, and there is no evidence it would have. Interway remained at all times adamant about *both* "conditions precedent for a proper request to register" (266a). The only way REA could get any action in the direction of registration—no matter how clearly and formally the pledgee manifested a concurrent desire—was to submit to Interway's arbitrary change in the rules, proceed to convert first, and accept the risk that if the "best efforts" of a reluctant Interway failed,[10] REA would have *less* of an asset than it had started with.

It is clear under New York law that insistence on terms not in the contract constitutes an anticipatory repudiation of the contract. *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F. 2d 283, 290 (4th Cir. 1974)

10. Cf. *Marx & Co., Inc. v. Diners' Club, Inc.*, 400 F. Supp. 581, 584 (S. D. N. Y. 1975) in which a factual pattern that began much the same way culminated in alleged "best efforts" but no registration.

(applying New York law). See also *Kromer v. Photo-Scan Corp.*, 305 F. Supp. 461, 465 (N. D. Texas 1969); *Pacific Coast Engineering Co. v. Merritt-Chapman & Scott Corp.*, 411 F. 2d 889, 894-895 (9th Cir. 1969). An anticipatory breach by one party excuses tender of performance by the other. "Acts made futile by the breaching party are not a prerequisite to recovery by the party claiming to have been wronged." *Scholle v. Cuban-Venezuelan Oil Voting Trust*, 285 F. 2d 318, 320 (2d Cir. 1960) (applying New York law). See also *Alpine Courts, Inc. v. Wiedermann*, 34 AD2d 951, 312 N. Y. Supp. 2d 718, 721 (1970); 17A C. J. S. 472(1) at pp. 658-59.

Arbitrary insistence on a change in the contract under the guise of an unwarranted "interpretation" constitutes an anticipatory breach. *Pacific Coast Engineering Co. v. Merritt-Chapman & Scott Corp.*, 411 F. 2d 889-895 (9th Cir. 1969). As stated in that case:

> " 'The persistent maintenance of an untenable construction of a contract on a matter of essential substance should be regarded as not consistent with a continuing intention to observe contractual obligations.' " 411 F. 2d at 895.

The application of the principle supported by these authorities is especially appropriate here, in view of the patent bad faith of Interway.

Interway plainly did not want to register—regardless of the order of conversion and registration (282a). Its correspondence reflects a determination to raise every possible basis for delay (282a, 286a, 292a, 293a, 306a). There is no evidence whatsoever that Interway genuinely feared that REA would engage in the frivolous and self-defeating course of wasting its right to registration by failing to follow up with a conversion.

III. Interway Cannot Rely on an Alleged Condition Which It Prevented REA From Performing.

The District Court found that the ". . . holders had their own reasons not to convert," and went to point out the lenders were relying on the "superior dividend, liquidation rights and redemption rights which the preferred enjoyed over the common." (98a, 102a). But the fundamental evaluation by the pledgee did not in fact differ from that of REA itself. Given a choice between restricted preferred and registered salable common, the pledgee preferred the common. The pledgee was ". . . in complete agreement that [REA] should go forward with the registration effort and they would provide the approval coincident with the sale or registration of our stock." (309a, 126a-127a). It was the demand for advance conversion that caused the difficulty. Unless and until the common shares were registered, the two securities were subject to the same restrictions on marketability and it was in this context that the pledgee made the comment, quoted by the District Court, as to the superior liquidation value of the preferred shares (*Ibid.*).[11]

Thus, Interway's insistence on conversion in advance of registration efforts was the cause of REA's inability to submit the pledgee's consent to the conversion. Under such circumstances it is well established that Interway is not entitled to rely on the breach of condition (even if it were a valid condition) on the part of REA.

Marx & Co., Inc. v. The Diner's Club, Inc., 400 F. Supp. 581 (S. D. N. Y. 1975), involved a remarkably

11. Even if the pledgee had been flatly unwilling to convert, REA would have been entitled to seek a substitute lender who would pay off the pledgee, accepting salable common stock or the right to the proceeds of the sale as security for the money advanced for this purpose. But Interway's insistence on conversion in advance of registration plainly foreclosed this approach.

similar situation. There, the defendant Diner's Club contended that it was excused from using its best efforts to register plaintiff's securities by the failure of plaintiff to comply with a condition precedent of the contract—that plaintiff tender an amount sufficient to reimburse it for one half of all registration expenses and deliver an indemnity agreement. The Court found that Diner's Club was disentitled to rely on the point both because it was slow in advising plaintiff of the amount to be paid, and because it demanded an excessive amount. The Court stated:

> "[I]t is . . . well-settled that a party cannot insist upon a condition precedent when he himself has caused its non-performance. *Wagner v. Derecktor*, 306 N. Y. 386, 188 N. E. 2d 570 (1954)", 400 F. Supp. at 585.

Accord *Spanos v. Skouras Theatres Corp.*, 364 F. 2d 161, 169 (2d Cir. 1966) (en banc); *Rainier v. Champion Containers Co.*, 294 F. 2d 96, 103 (3d Cir. 1961) (applying New York law); *Simon v. Electrospace Corp.*, 28 N. Y. 2d 136, 269 N. E. 2d 21, 24 (1971); *Levy v. Lacey*, 22 N. Y. 2d 271, 239 N. E. 2d 378, 381 (1968); *Amies v. Wesnofske*, 255 N. Y. 156, 174 N. E. 436, 438 (1931); Restatement of Contracts § 315.

CONCLUSION.

The judgment appealed from should be reversed, and the case should be remanded for the determination of the damages recoverable by appellant as a result of appellee's refusal to register the common stock into which appellee's preference shares were convertible.

Respectfully submitted,

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INTERWAY CORPORATION,
Defendant-Cross Appellant:

Docket Nos. 76-7099,
76-7100

CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant's Brief and two copies of the Joint Appendix were mailed to Stephen A. Weiner, Esq., Winthrop, Stimson, Putnam & Roberts, 40 Wall Street, New York, N. Y. 10005 on April 30, 1976.

Judith R. Cohn
JUDITH R. COHN